

**FILED**

**NOV 09 2001**

CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IO

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES LYNN MOYER,

Defendant.

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Criminal No. 01-66

**JURY INSTRUCTIONS**

MEMBERS OF THE JURY, THE COURT NOW GIVES YOU THE FOLLOWING  
INSTRUCTIONS:

INSTRUCTION NO.   /  

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because **all** are important. This is true even though some of those I gave you at the beginning of the trial are not repeated here.

These written instructions that I am now giving you will be available to you in the jury room.

INSTRUCTION NO. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits and the facts that have been stipulated--this is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

INSTRUCTION NO. 41

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence--such as the testimony of an eyewitness. The other is circumstantial evidence--the proof of a chain of circumstances pointing to the commission of the offense.

The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 5

In deciding what the facts are, you will have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, and motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 6

A separate crime is charged against the defendant in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime.

INSTRUCTION NO. 7

You have heard evidence that Daniel Ricke received a promise from the Government that he would not be prosecuted. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by the Government's promise is for you to determine.

Only the United States may grant immunity to a witness and thereby compel testimony.



INSTRUCTION NO. 8

The indictment in this case charges the defendant with five different crimes.

Under Count 1, the indictment charges that the defendant committed the crime of concealing a material fact from the U.S. Small Business Administration by trick, scheme or device, on or about February 24 and February 25, 1997, in violation of Title 18, United States Code, Section 1001(a)(1).

Under Count 2, the indictment charges that the defendant committed the crime of attempting to defraud NationsBank (previously known as Boatmen's Bank Iowa), from on or about February 27, 1998, until on or about June 26, 1998, in violation of Title 18, United States Code, Section 1344(1).

Under Count 3, the indictment charges that the defendant committed the crime of knowingly and intentionally transporting more than \$10,000 in United States currency out of the United States on or about July 8, 1998, without filing a report with the United States Customs Service, in violation of Title 31, United States Code, Sections 5316(a)(1)(A) and 5322(a).

Under Count 4, the indictment charges that the defendant committed the crime of embezzlement from the Allied Wholesale Meats, Inc., Retirement Plan, on or about January 8, 1999, in violation of Title 18, United States Code, Section 664.

Under Count 5, the indictment charges that the defendant committed the crime of money laundering in criminally derived property obtained from embezzlement from the Allied Wholesale Meats, Inc., Retirement Plan, on or

about January 21, 1999, in violation of Title 18, United States Code, Section 1957.

The defendant has pleaded not guilty to each of those charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the Government proves, beyond a reasonable doubt, each essential element of the crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

INSTRUCTION NO. 9

The indictment charges that the offenses were committed "on or about" certain dates.

Although it is necessary for the Government to prove beyond a reasonable doubt that each of the offenses was committed on a date reasonably near the dates alleged in the indictment, it is not necessary for the Government to prove that the offense was committed precisely on the dates charged.

Likewise, the indictment alleges that certain approximate amounts of money were involved in the crimes charged, but it is not necessary for the Government to prove the exact or precise amount of money alleged in the indictment.

INSTRUCTION NO. 10

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 11

The crime of concealing a material fact from the U.S. Small Business Administration, as charged in Count 1 of the indictment, has four essential elements, which are:

*One*, the defendant knowingly, voluntarily and intentionally concealed the fact that no cash or equity injection had been made in a loan for the purchase of Smith's Wholesale Meats Company, which was guaranteed by the U.S. Small Business Administration ("SBA");

*Two*, the defendant did so by use of a trick, scheme, or device, that is, a course of action intended to deceive others;

*Three*, the fact was material to the U.S. Small Business Administration; and

*Four*, the guaranteed loan was a matter within the jurisdiction of the U.S. Small Business Administration. You may find that this element has been satisfied if you find that the SBA's function includes guaranteeing loans made by lenders participating in its programs.

A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the SBA. However, whether a fact is "material" does not depend on whether a course of action intended to deceive the SBA actually succeeded, and it is not necessary for the SBA to have suffered a financial loss.

For you to find the defendant guilty of the crime charged under Count 1, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 12

The crime of bank fraud, as charged in Count 2 of the indictment, has three essential elements, which are:

*One*, the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution;

*Two*, the defendant did so with intent to defraud; and

*Three*, the financial institution was insured by the Federal Deposit Insurance Corporation ("FDIC").

The phrase "scheme to defraud" includes any plan or course of action intended to deceive or cheat another out of money, property or property rights by employing material falsehoods, concealing material facts, or omitting material facts. Fraudulent concealment of material facts can constitute a "scheme to defraud," even absent any affirmative misrepresentation or duty to disclosure. A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the institution in deciding whether to take some action or refrain from taking action.

Proof of a "scheme to defraud" does not require proof of an actual financial loss to the bank. Likewise, it is not a defense that the bank might have prevented its loss if it had used better internal controls or procedures.

To act with "intent to defraud" means to act knowingly with the intent to deceive or cheat, for the purpose of causing some financial loss or loss of property or property rights to another or bringing about some financial gain to

oneself or another to the detriment of a third party. If you find beyond a reasonable doubt that the bank would be injured as a natural consequence of the defendant's actions you may, but are not required to, infer that the defendant acted with "intent to defraud."

For you to find the defendant guilty of the crime charged under Count 2, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 13

The crime of engaging in an unreported transportation of currency, as charged in Count 3 of the indictment, has three essential elements, which are:

*One*, on or about July 8, 1998, the defendant knowingly transported more than \$10,000 in currency at one time from a place in the United States to or through a place outside the United States;

*Two*, the defendant knew that he had a legal duty to file a report of the amount of currency transported; and

*Three*, the defendant deliberately failed to comply with the reporting requirement.

In determining whether defendant acted knowingly and deliberately, you may consider both direct and circumstantial evidence, including any evidence that the defendant was an experienced international traveler or that the defendant had a motive to conceal the international transportation of currency. You may, but are not required to, infer that the defendant acted knowingly and deliberately based upon this evidence.

For you to find the defendant guilty of the crime charged under Count 3, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.



INSTRUCTION NO. 14

The crime of embezzlement from an employee pension benefit plan, as charged in Count 4 of the indictment, has three essential elements, which are:

*One*, in or about December 1998 and January 1999, the defendant embezzled, stole, willfully abstracted or converted to his own use or the use of another approximately \$468,926.16 (after subtracting certain penalties and wire transfer fees) of assets belonging to the Allied Wholesale Meats, Inc., Retirement Plan;

*Two*, the Allied Wholesale Meats, Inc., Retirement Plan was an employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 (also known as "ERISA"); and

*Three*, the defendant acted knowingly, with the intent to deprive the plan of its funds or with reckless disregard for the interests of the plan.

You may find that the Government has proved the first element if you find that the defendant embezzled or stole or willfully abstracted or converted to his own use or the use of another a substantial amount of monies, funds, or other assets belonging to the plan. "Embezzlement" means the voluntary and intentional taking of the property of another, which property came into the defendant's possession lawfully, by virtue of some office, employment, or position of trust which the defendant held. To "steal" means to take dishonestly, with the intent to deprive the owner permanently or temporarily of the rights and benefits of ownership. The term "abstracted" means to have taken or withdrawn money or

property of the plan without the authority to do so. The term “converted” means to have used money, property, or assets, which are in one’s custody for a limited purpose, in an unauthorized manner or to an unauthorized extent. It is not required that the defendant personally profit from the improper transfer of such monies, funds, or other assets out of the plan.

It is not required that the defendant intended to deprive the plan of its funds permanently, nor is it relevant that the pension fund might later recover the assets through civil litigation, insurance, repayment, or some other arrangement.

For you to find the defendant guilty of the crime charged in Count 4, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 15

The crime of engaging in a monetary transaction in property derived from embezzlement from an employee pension benefit plan, as charged in Count 5 of the indictment, has five essential elements, which are:

*One*, on or about January 21, 1999, the defendant knowingly wrote, signed, and caused to be transmitted, a check drawn payable to "Nation Wide/FBO Terrence Mealy" in the amount of approximately \$468,934.00;

*Two*, the check was comprised of more than \$10,000 derived from embezzlement from an employee benefit plan, as charged in Count ~~5~~<sup>4</sup> and as previously defined in these instructions;

*Three*, the defendant then knew that the check involved proceeds of a criminal offense;

*Four*, the payment by check took place in the United States; and

*Five*, the payment by check in some way or degree affected interstate commerce. You may find that the payment by check affected interstate commerce if you find that the check was made using a federally-insured bank; or if you find that the bank was engaged in activities having an effect on interstate commerce; or if you find that the check was transmitted and paid to an insurance company doing business in another state. It is not necessary for the Government to show that the defendant actually intended or anticipated an effect on interstate commerce. All that is necessary is that the natural and probable consequence of the defendant's actions would be to affect interstate commerce, no matter how

minimally.

For you to find the defendant guilty of the crime charged in Count 5, the Government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 16

Intent or knowledge may be proved like anything else. You may consider statements made and acts done by the defendant, and all facts and circumstances in evidence which may aid in the determination of the defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 17

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict--whether guilty or not guilty--must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court.

Remember that you should not tell anyone--including me--how your votes stand numerically.

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict whether guilty or not guilty must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be--that is entirely for you to decide.

Sixth, remember that you are not partisans; you are judges – judges of the facts. Your sole duty is to find the truth and do justice. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence.

INSTRUCTION NO. 18

Submitted to you with these instructions is a verdict form. When you reach your verdicts, have your foreperson sign the verdict form.

All twelve jurors must agree to the verdicts reached.

When you have reached your verdicts, notify the court security officer.



RONALD E. LONGSTAFF, Chief Judge  
U.S. District Court



**INSTRUCTION NO. 19**

**As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.**

**In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. You must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with disposition to re-examine your own views.**

**Remember that if in your individual judgment the evidence fails to establish guilt beyond a reasonable doubt, then**

the defendant should have your vote for a not guilty verdict. If all of you reach the same conclusion, then the verdict of the jury must be not guilty. Of course the opposite also applies. If in your individual judgment the evidence establishes guilt beyond a reasonable doubt, then your vote should be for a verdict of guilty and if all of you reach that conclusion then the verdict of the jury must be guilty. As I instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt every essential element of the crimes charged.

Finally, remember that you are not partisans; you are judges -- judges of the facts. Your sole interest is to seek the truth from evidence. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. But I suggest that you now carefully reconsider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

**There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.**

**Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.**